Docket Management Facility
(USCG-2003-14472)
U.S. Department of Transportation, Room PL-401
400 Seventh Street, SW
Washington, DC 20590-0001

Re: VESSEL DOCUMENTATION: LEASE FINANCING FOR VESSELS ENGAGED IN THE COASTWISE TRADE; SECOND RULEMAKING

Dear Sir or Madam:

The Offshore Marine Service Association (OMSA) represents more than 285 firms that are engaged in support of the exploitation of mineral and oil resources, including 95 companies that operate special purpose vessels in support of domestic offshore oil and gas operations. Most of these companies are family owned and operated businesses. Our association's members operate over 1,200 U. S. flag, Jones Act Qualified vessels in the Gulf of Mexico alone. These special purpose vessels represent one of America's most vibrant maritime sectors. They are engaged principally in Outer Continental Shelf (OCS) support activities, which has, in today's post September 11th circumstances, special significance with respect to this country's economic and national security interests.

We believe that the Coast Guard has shown the desire and, here, through this second notice of proposed rulemaking, has the opportunity to further define the lease/finance provision of the Coast Guard Authorization Act of 1996.

The majority of vessel operating companies that support our vital domestic offshore oil and natural gas production are family owned businesses. Since 1996, we estimate that U.S. Section 2 owners have spent well over $700 million dollars building technologically advanced deepwater offshore support vessels, with hundreds of millions of dollars also spent on constructing smaller offshore support vessels. This investment in the future of our domestic offshore oil and natural gas support fleet was made in reliance on the protections offered by the Jones Act.

The protections that the Jones Act provides to this segment of our industry are therefore clearly vital to the financial viability, defense and support of this critical industry, and other maritime sectors, which in the absence regulatory guidelines, we contend, had been seriously compromised by an expansive interpretation and loose implementation of the Lease-Finance provisions of the Coast Guard Authorization Act of 1996.

The Offshore Marine Service Association and its U.S. Section 2 member operators have taken the firm position that the Lease-Finance provisions of the Coast Guard Authorization Act of 1996 were intended as a very limited exception to the U.S. ownership and control provisions of the Jones Act, and applaud the Coast Guard's reiteration of this principle. We are encouraged as a result of the recent promulgation, by the U.S. Coast Guard, of both the final rule (USCG-2001-8825) and this proposed second rulemaking, both of which go a long way towards closing dangerous loopholes that had been exploited in the initial implementation of the Lease-Finance provisions.

With the exception that a very few, but critical, legislative corrections may be required, we stand in support of the final rule and to comment on the proposed rulemaking. There are, still, a number of areas that require clarification.

1. In the body of discussion of the proposed rulemaking, the Coast Guard raises the issue as to the extent and precisely how the Coast Guard should prohibit or restrict the chartering back of a lease-financed vessel from the U.S. demise charterer to the owner, the parent of the owner, or to a subsidiary or affiliate. The Coast Guard states that this question is presented as alternatives, as reflected in modified sections a) 46 CFR part 67.20 (a)(6) and b) 67.20 (a)(9). While the rulemaking states that either or both may be adopted, we support the adoption of 67.20(a)(9) and the exclusion of 67.20(a)(6) as we believe that 67.20(a)(6) would need a significant rewrite to accomplish the abilities and controls that are attributed to it in the preamble.

a) If, in fact, 46 CFR 67.20 (a)(6) is the alternative adopted, the proposed rule would be revised to include language that the investment in the vessel(s) is primarily financial in nature, without the ability and intent to directly or indirectly control the vessel's operations by a member of the Group.

While we do not support the adoption of 67.20(a)(6), we agree with the intent the Coast Guard ascribes to this section in the discussion, and we support that intent. The proposed rule would revise 46 CFR 67.20 (a)(6) to include language that the investment is primarily financial in nature without the ability and intent to directly or indirectly control the vessels operations by a member of the Group. We do not believe the Coast Guard will know the full intent of the parties, if the parties sign side agreements, such as has been reported by Groupe Bourbon and Rigdon Marine, unless those side agreements are made public (which is unlikely).

Unfortunately, however, we also believe section (a)(6) will fail to live up to the objectives laid out for it in the discussion unless the supporting definitions from the final rulemaking (8825) used throughout the discussion such as those for Affiliate, Subsidiary, Group and the aggregate revenues test undergo rewording or elucidation.

Section (a)(6) should also address the issue of economic control in charter-back agreements in order to accomplish the goals as stated in the preamble. The rule needs additional wording to prevent foreign controlled corporations, especially those that have inverted to reduce their U.S. tax liability, from using the Lease-Finance provisions as a means of importing their foreign tax advantages into the U.S.

For the reasons stated above we recommend against adoption of alternative 67.20(a)(6)

b) If 46 CFR 67.20 (a)(9) is adopted the proposed rule would modify this section, (a)(9), to prohibit the charter back to a member of the group of which the vessel's owner is a member. It would provide a narrow, stipulated exception allowing charter back agreements if the charter back is expressly for the purpose of carrying proprietary cargoes.

We support adoption of alternative provision 67.20(a)(9) as a first choice.

We agree with the Coast Guard's stated purpose that the Lease-Finance provision was intended as a very limited exception to the U.S. Section 2 ownership and control principles of the Jones Act. The revisions to (a)(9) go a long way towards closing perceived loopholes in the initial implementation of the Lease-Finance provisions of the Coast Guard Authorization Act of 1996, but may still require some rewording. The addition of an exception for the carriage of proprietary cargoes appears to be in accord with current proprietary cargoes

exception found in the law, for example "Bowaters." However, the final resolution of this issue may still require legislative clarifications.

During the past year, in fact, OMSA and other members of the Jones Act Lease Finance Coalition engaged in intense negotiations with non-Section 2 vessel operators to clarify this issue legislatively, and recognizing that parties like BP may have requirements to carry proprietary cargoes in certain identified situations. We do not disagree with a certain level of flexibility with respect to proprietary cargo carriage that the Coast Guard and MARAD may deem appropriate in the case of emergencies. A draft of the negotiated/proposed statutory language that was prepared for Congressional committees with jurisdiction over this issue is attached for your review. (See attached document for exact language agreed upon.) While this language has not, as yet, been incorporated into any legislation, we believe that it is important for the Coast Guard to be aware that a specific agreement had been reached between BP, OMSA, and other maritime sectors, which were parties in the negotiation and to the consensus language that was to be presented as a legislative amendment.

We further recognized that the tank vessels, which BP currently has under construction, may need to be considered separately. However, we believe it is important for it to be understood, that OMSA is firm on the position, as reflected in the agreed upon legislative proviso, approved by BP, that neither BP nor any other non-Section 2 vessel owner/operator should interpret the flexibility of our reasonable accommodation on proprietary carriage of oil, chemical or natural gas cargoes, on tankers or tank vessels, either existing, under construction or under contract to inject itself into the offshore transportation industry through the construction and charter of vessels under 6000 GT. This specifically includes any vessels engaged as offshore supply ships utilized in Jones Act trades, as this is precisely the type of scheme OMSA has fundamentally objected to and specifically questioned with respect to the Nabors and Groupe Bourbon transactions.

2. The proposed rule revises 46 CFR 67.20 (b) to modify the grandfather provisions of the final rule to a maximum of 3 years.

We fully support this provision. We believe this provides a reasonable time frame for companies to come into compliance with the rule or to divest their U.S. vessel fleet. While the rule does not specify, a provision should be added to require a review of all documents previously issued for compliance with the rules published on February 4th and this second rulemaking.

3. The rulemaking raises the issue "whether 46 CFR part 67.179 should be revised to require third party to auditors review documentation requests prior to approval?"

The NVDC should be able to request and obtain any technical support required to assist them in reviewing complex transaction agreements. While all agreements may not need external review, there may be certain "triggers" to establish when, in the Coast Guard's discretion such a review is required. Toward that end, the Coast Guard asks eight additional questions:

a. Should an independent auditor be used? We submit that an independent auditor should be used, but the criteria for such an audit need to be developed. In addition to external audit, a public review of certain document requests and opportunity for public comment may be appropriate. Also, the public should be able to provide additional documentation to the Coast Guard that may call into question the validity of any agreements presented to the Coast Guard.

b. What are the minimum qualifications for this auditor? The qualifications need to be recommended to and developed for the Coast Guard by specialists who handle similar transactions.
c. Who should select the auditor? The Coast Guard should select the auditor. The auditor should be chosen from a list of auditors, of persons or firms meeting the minimum qualifications eventually set. Similar to conflict of interest rules with attorney's and judges, an auditor should be prohibited from having any current business relationship with the owner, parent, group or their legal representatives in the case.
d. If the applicant selects the auditor, how should the Coast Guard ensure that the auditor is independent? We believe the Coast Guard should identify and select the auditor(s) engaged in each case.
e. What standards should the auditor apply in reviewing the documents? The Coast Guard can examine the documents on their face. An auditor must look beyond the paper provided to the Coast Guard. The Coast Guard and/or the auditor, particularly in cases that are not routine, should have an "investigatory" mandate allowing it to examine evidence not in the record such as press and/or financial reports, public statements and any other pertinent information.
f. Would the added benefit outweigh the additional time and expense? We believe it would.
g. Would the audit be an inherent government function that should not be entrusted to a third party auditor? In our opinion, it may be inherently a government function, but to make it solely a government function would create an unreasonable delay. An independent third party review might add some time, but a delay while the government develops and retains the necessary expertise would be unreasonable
h. Should the Coast Guard expand its investigations and examination of documents? The investigations and examination of applications should be increased. But, trusted agents, independent of the party to be investigated, not dissimilar to independent surveyors, can accomplish that function.

4. Finally, in the rulemaking MARAD proposes to revise 46 CFR Part 221 to require prior approval from MARAD prior to any "charter back" agreements.

When MARAD requested comments to its approval of charter agreements OMSA commented that MARAD should reassume this duty. In the final analysis, if the Coast Guard's final rule and this second proposed rulemaking results in adoption of alternative 67.20(a)(9) and the prohibition of "charter back" agreements the question may become moot.

Similarly, if "charter back" agreements are allowed, and, questionable transactions for documentation and/or "charter back" are reviewed by independent auditors selected by the Coast Guard, review by MARAD may not be required. However, if the Coast Guard proposed rules allow "charter back" agreements and do not provide for an independent third party review, supervision and prior approval of "charter back" agreements by MARAD would be imperative in order to prevent transactions that result in illegal activities, directly or indirectly, by non Section 2 citizens. Finally, as a third scenario, MARAD, rather than independent third party auditors, or the Coast Guard, might be considered as the agent to review such transactions.

We appreciate this opportunity to submit the above comments to the docket.

Very truly yours,

OFFSHORE MARINE SERVICE ASSOCIATION

Robert J. Alario
President

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March 5, 2004 – DRAFT
SEC. ____. CLARIFICATION OF LEASE FINANCING.

(a) AMENDMENT TO 46 U.S.C. 12106(e). – Effective upon the date of the enactment of this amendment, 46 U.S.C. § 12106(e)(1)(B) is amended to read as follows:

"(B) the person that owns the beneficial interest in the vessel is –
(i) a leasing company, bank or other financial institution that certifies to the Secretary that it –
(a) owns the vessel solely as a passive investment,
(b) does not operate any vessel for hire and is not an affiliate of any person who operates any vessel for hire, and
(c) is independent from and not an affiliate of any charterer of the vessel or any other person who has the right, directly or indirectly, to control or direct the movement or use of the vessel; or

(ii) a person who, in the case of a tank vessel having a tonnage of not less than 6,000 gross tons as measured under section 14502 of this title, or an alternative tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title, upon application for documentation under this subsection and annually thereafter certifies to the Secretary that –
(a) the aggregate book value of the vessels owned by such person and its U.S. affiliates does not exceed 10 per centum of the aggregate book value of all assets owned by such person and its U.S. affiliates;
(b) no greater than 10 per centum of the aggregate revenues of such person and its U.S. affiliates is derived from the ownership, operation or management of vessels; and
(c) at least 70 per centum of the aggregate tonnage of all cargo carried by all vessels owned by such person and its U.S. affiliates and documented under this section is proprietary cargo; provided, however, that should circumstances beyond the direct control of such person or its affiliates prevent or reasonably threaten to prevent such person from satisfying this proprietary cargo requirement, such person may so notify the Secretary in writing, and upon receipt of such notice and after verifying the existence of such circumstances, the Secretary shall waive or modify the proprietary cargo requirement to the extent reasonably necessary for a period of time beginning on the date the circumstances began, and ending on the date the circumstances end.

(b) DEFINITIONS. – As used in this section:
(1) AFFILIATE.- The term "affiliate" means with respect to any person, any other person that is directly or indirectly controlled by, under common control with, or controlling such person, or any other person named as being part of the same consolidated group in any report or other document submitted to the U.S. Securities and Exchange Commission or the Internal Revenue Service.
(2) PERSON.- The term "person" means any individual, corporation, limited liability company, partnership, joint venture association, joint stock company, trust or unincorporated organization.

(3) PROPRIETARY CARGO.- The term "proprietary cargo" means cargo that is beneficially owned by the person certifying under 46 U.S.C. 12106(e)(1)(B)(ii) or an affiliate of such person immediately before, during or immediately after such cargo is carried in coastwise trade on a vessel owned by such person; provided, however, that in the case of a vessel pooling or sharing arrangement, cargo that is not beneficially owned by a person certifying under 46 U.S.C. 12106(e)(1)(B)(ii), nor by an affiliate of such person, but that is carried in coastwise trade by a vessel owned by such person, shall nevertheless be deemed proprietary cargo for purposes of 46 U.S.C. 12106(e)(1)(B)(ii) to the extent that an equal amount of cargo beneficially owned by such person or its affiliate is carried in coastwise trade on one or more other vessels, not owned by such person or its affiliates, that are in such vessel pooling or sharing arrangement. Cargo shall not be deemed beneficially owned by a person if title to the cargo is held for non-commercial reasons and primarily to evade restrictions against non-proprietary cargo shipments under 46 U.S.C. 12106(e)(1)(B)(ii). A vessel having a gross tonnage of less than 6,000 gross tons as measured under section 14502 of this title, or an alternative tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title, meets the requirements of 46 U.S.C. 12106(e)(1)(B)(ii) if such a vessel is a propelling unit for a non-self-propelled tank vessel that may be documented under 46 U.S.C. 12106(e), and the two vessels can be connected by mechanical or other means, such that they function as a single self propelled vessel. For purposes of ascertaining the percentage of proprietary cargo carried, the two vessels shall be deemed a single vessel.

(4) TANK VESSEL.- The term "tank vessel" has the same meaning as that term under 46 U.S.C. 2101.

(5) U.S. AFFILIATE.- The term "U.S. affiliate" means with respect to a person, any affiliate incorporated, or having its principal place of business or domicile in a State or the District of Columbia.

(c) EFFECTIVE DATE.- This section shall become effective upon its enactment, provided however, that this section shall not apply to any certificate of documentation endorsed with a coastwise endorsement for a vessel under 46 U.S.C. 12106(e) that was issued prior to February 4, 2004, nor to any renewal of any such certificate that expires prior to February 4, 2007, provided that if such certificate or renewal was obtained improperly under the law in effect at the time it was issued, such certificate or renewal shall be subject to termination at any time. On and after February 4, 2007, any certificate of documentation endorsed with a coastwise endorsement for a vessel under 46 U.S.C. 12106(e) prior to the date of enactment of this section and any renewal thereof that does not meet the requirements of this section shall be revoked.

(d) CERTAIN VESSELS.- All cargo carried on any vessel that is either a self-propelled tank vessel having a length of at least 210 meters or a liquefied natural gas carrier, delivered by its builder after December 31, 1999, and purchased by a person for the purpose, and with the reasonable expectation, of transporting proprietary liquefied natural gas or unrefined petroleum from Alaska to the Continental United States, shall be deemed proprietary cargo of the person owning the vessel for purposes of paragraph (1)(B)(ii) of subsection (e) to 46 U.S.C. § 12106.

Explanation:

Federal law strictly requires that vessels operating in the U.S. coastwise trade be at least 75% owned and controlled by U.S. citizens. 46 U.S.C. § 12106(a); 46 App. U.S.C. § 802. A narrow exception to these laws was included in the Coast Guard Authorization Act of 1996 (adding 46 U.S.C. §12106(e)) to allow non-citizen financing institutions to hold title to coastwise vessels for

the purpose of providing lease financing to U.S. citizens. While the vast majority of transactions approved under this provision have been consistent with its purpose, foreign maritime operators have used the provision in a few transactions to make undesirable incursions into the coastwise trade. Such unintended use seriously undermines the legal and economic assumptions upon which American citizens have invested billions of dollars in the domestic maritime industry. It also provides the potential for unprecedented control over America's domestic maritime infrastructure by foreign maritime operators, contrary to our national and homeland security interests.

The amendment insures that 46 U.S.C. §12106(e) accomplishes its original purpose without the unintended result of opening the U.S. coastwise trade to foreign maritime operators. Under this amendment, if the foreign owner is a financial institution, it must own the vessel as a passive investment and cannot be affiliated with a vessel operator or any charterer of the vessel. This prevents a foreign maritime operator from having control over the operation or use of the chartered vessel.

Alternatively, a person that is part of a group having substantial proprietary shipping requirements in the United States can own tank vessels 6,000 gross tons and larger, and use them primarily to transport such proprietary cargoes. Non-citizen ownership and use in similarly limited circumstances has long been permitted under the Bowaters Amendment (46 App. U.S.C. §883-1) and is consistent with the 1996 amendments. Under the amendment, limited carriage of third party cargoes also is permitted in and among such vessels provided it is incidental to, or otherwise is related to the effective utilization of such vessels purchased primarily for, the carriage of proprietary cargo. Even more non-proprietary carriage is permitted whenever sufficient proprietary cargoes are not available due to circumstances beyond the owner's control, including, but not limited to, major disruptions of normal supply patterns or damage to cargo production facilities or logistics infrastructure by acts of terrorism or otherwise. In the same vein, the amendment also permits non-citizen entities to own qualified vessels that may carry non-proprietary cargoes in the coastwise trade under this subsection, provided the vessels originally are purchased primarily to carry proprietary liquefied natural gas or unrefined petroleum from Alaska to the Continental United States. Such vessels would not include vessels acquired primarily with the object of offering for hire services to unrelated third parties, competing with then existing, unrelated U.S. maritime services providers in the Alaska trade.

The Committee recognizes that the requirements imposed by the Coast Guard in implementing section 12106(e) in Final Rules and Proposed Rules published February 4, 2004 will change as a result of this amendment. Consistent with the Proposed Rules, a three-year transition provision is included for entities that have properly obtained certificates of documentation. Entities that have obtained certificates of documentation prior to the date of enactment will not have to reapply for new endorsements under the Section as revised by this amendment, so long as they comply with requirements imposed by the Coast Guard at the time the endorsement was issued. The Committee expects that the Coast Guard will not disapprove any transaction approved under the prior version of 46 U.S.C. Section 12106(e) if such transaction also meets the requirements of this Section, as amended by this amendment. Such ownership and documentation for coastwise trade in compliance with Coast Guard requirements was, and continues to be, consistent with the intent of the Congress.